Chapter 36
‘Literature review? What Literature review?!’ – the Influence of Legal Culture on Scholarship in International Arbitration
Rémy Gerbay

I. INTRODUCTION

36.1 Some time ago, an Italian student approached me for advice on her master's degree thesis. That student had read an English-language manual on how to draft a dissertation in the field of law. In that manual, she was told to start with a 'literature review', and then move on to an account of her own research. Needless to say, this Italian student was baffled. "Literature review? What Literature review?" she asked 1 – because for that student, summarising exhaustively all prior academic writings on a particular subject, and then offering some level of critical analysis of the existing literature was, in itself, already valuable legal research. Naturally, coming from a similar cultural background (i.e. another continental European civil law jurisdiction), I could relate.

36.2 This, in essence, is what this Chapter is about: the influence of legal culture on international arbitration scholarship. To be more precise, the discussion to which this paper attempts to contribute is whether, and if so to what extent, a researcher's background influences the manner in which he or she conceives of, and therefore conducts, academic research in the field of international arbitration. This question was the topic of a short presentation on a panel on 'legal research in arbitration' at the 30th anniversary conference of the School of International Arbitration at Queen Mary University of London.

36.3 Academics (and their students) seem to have varying perspectives as to what legal research entails depending on their background. For instance, opinions vary as to what constitutes interesting topics within the field of arbitration; what methodological approaches are to be preferred; and even which publication media (i.e. journal article, book etc.) are more worthy of a researcher's efforts. If the above impressions are true, this diversity would contrast with the increasingly uniform manner in which arbitral proceedings are conducted in practice 2. It would indeed be quite remarkable that the

1 Dr. Rémy Gerbay, PhD (Queen Mary, University of London), LL.M (Georgetown), DEA (Graduate Institute, Geneva), Maîtrise (Lyon – Jean Moulin) is Lecturer at Queen Mary, University of London. He is also a practitioner (Admitted NY and England & Wales) and arbitrator based at Enyo Law LLP.
2 Or, rather, she exclaimed.
3 For a general discussion of the convergence of international arbitration practice see: K. T Jacobs, M. G. Paulson, Convergence of Renewed Nationalization, Rising Commodities, and Americanization in International Arbitration and the Need for More Rigorous Legal and Procedural Defenses, 43 Tex. Int'l
convergence of approaches to international arbitration practice (and the emergence of a so-called legal culture of arbitration) observed over the last few decades, would not have translated into the manner in which we seek to further our collective understanding of arbitration. This would be particularly surprising because, as one author puts it, “in arbitration, perhaps more than any other field of law, the line between scholar and practitioner is blurred so that many leading scholars are involved in arbitrations, and many leading arbitrators take the time to write academic articles and books”.

36.4 The aim of this short Chapter is to bring this topic to the fore, and this paper does so by taking a particular angle: that of comparing doctoral research in the field of international arbitration in a civil law jurisdiction, France, and a common law one, England, for the period 2005 - 2015. If doctoral research does not constitute a perfect proxy for the purposes of assessing the level of convergence/divergence of academic research in arbitration across cultural lines, it offers nonetheless fascinating insights into the subject of this Chapter.

36.5 In the first part, this Chapter attempts to bring some clarity to the notion of legal culture, and to identify conventional assumptions as to how legal culture may possibly affect approaches to scholarship in arbitration. Secondly, the paper considers whether an analysis of doctoral theses defended in France and the UK for the period 2005-2015 in the field of arbitration confirms these conventional assumptions.

36.6 The key findings are that, while remarkably similar in their failure to embrace multidisciplinary approaches to research, as well as non-legal doctrinal methodologies, doctoral theses in the UK and France do display some differences, in particular with respect to the topics chosen. In this respect, the varying breadth of the topics, and the varying levels of practicality vs. theoreticality are only some of the most visible differences observed.

---


6 See discussions below.
II. WHAT IS LEGAL CULTURE, AND HOW CAN IT INFLUENCE RESEARCH IN ARBITRATION?

36.7 US Law professor Karl E. Klare defines legal culture as the “professional sensibilities”, the “habits of the mind”, and the “intellectual reflexes” which distinguish the lawyers from one particular jurisdiction or family of legal systems (such as the civil law or the common law) from the lawyers of another jurisdiction or family of legal systems. According to Klare, therefore, legal culture encompasses, not only the ethical values we hold and the political assumptions we make, but also all the “rhetorical strategies” and the “argumentative moves” we display, consciously or unconsciously, as participants in one particular legal setting.

36.8 These values, assumptions, or intellectual reflexes, may derive from our respective educational backgrounds, and in particular, where we received our legal education. It may also be the result of the professional settings in which we operate. As discussed below, the precise expectations imposed on a law professor may not be the same in North American legal academia as in European academia. They also may vary between British and continental European schools and, similarly, at a more nuanced level perhaps, within continental Europe. In this conception, legal culture is therefore understood as, “a feature of the decision making environment of legal actors” where “[...] prior cultural endowments create the preferences behind certain choices, either procedural or substantive”, and where “[...] preferences of legal actors are exogenously produced by the national culture or legal tradition and will shape behaviour”.

36.9 

Prima facie, legal culture may be expected to influence research in law, and therefore research in arbitration law, at various levels. On one perspective, one may expect legal culture to impact the choice of topics or themes that legal scholars deem worthy of interest. For example, a conventional assumption is that academics in common law jurisdictions may be more inclined to avoid legal practice-related topics, preferring more abstract ones.

---

8 For Goldring, the differences in approaches to scholarship can indeed result from differences in “the conditions under which legal educators and legal scholars work” in various countries. J. Goldring, Babies and Bathwater: Tradition or Progress in Legal Scholarship and Legal Education? 17 U.W. Austl. L. Rev. 216, 220 (1987).
36.10 Legal culture may also be expected to influence the theoretical underpinnings of a researcher. Kelsenian positivism, which remains relatively prevalent in continental Europe, never took hold in the same manner in the UK, and lesser still in the United States. Conversely, other forms of positivism (such as, the positivism of HLA Hart), American legal realism, Critical Legal Studies and other approaches to law, flourished in US law schools, but never displaced Kelsen’s positivism in many parts of the civil law world. It would, of course, be an exaggeration to say that in civil law / continental European schools, enquiries into non-legal materials (for example, economic or sociological considerations, or non-legal norms like ‘moral values’ or ‘political beliefs’) are beyond the scope of legal study. However, anecdotal evidence does seem to suggest a greater interest by common law academics in multidisciplinary research than in the civil law world. Similarly, there is a perception that for common law scholars limiting the scope of legal thinking to the internal workings of a given legal system, as is typically required in purely legal doctrinal scholarship, is seen as “utterly sterile”.

36.11 A researcher’s cultural ‘heritage’ or ‘patrimony’, may also have an impact on his or her approach to research methodology. Empirical studies (requiring quantitative analysis of data) appear more common in North America, and perhaps even in the United Kingdom, than they are in continental Europe where purely doctrinal –or some may say “legal-dogmatic”- research continues to be the norm. This mirrors the degree of interest, or the esteem, displayed by academics for these different methodologies. Over two decades ago, Richard A. Posner and judge Harry T Edwards observed (with


12 For example, the description given by French Professor Raphael Romi of what constitutes proper legal methodology in France, does make some room for enquiries into political sciences. Raphael Romi, Methodologie de la Recherche en Droit, (2nd ed., Litec 2011).

13 Villegas and Lejeune, for example, explain that despite the fact that early French sociologists like Émile Durkheim took an interest in the study of the law, sociology of law did not encounter the same success in France as in some common law jurisdictions. M. Garcia Villegas and A. Lejeune, La sociologie du droit en France: De deux sociologies à la création d’un projet pluridisciplinaire?, 66 Revue interdisciplinaire d’études juridiques, 1-39 (2011).


particularly strong disapproval for the latter) “[...] a shift away from doctrinal legal scholarship at the leading [US] law schools”\(^{18}\). In fact, according to Posner, the “[...] production of doctrinal work [in America] has shifted toward scholars at law schools of the second and third tier”\(^{19}\). This allegedly contrasts with continental European academia\(^ {20}\). Some authors explain the continued attractiveness of legal doctrinal research in European academia inter alia by the fact “[...] most legal researchers in Europe are still trained as ‘black letter’ lawyers and usually do not have a PhD in another (social) science as in increasingly the case at the elite law schools in the United States”\(^ {21}\).

Are all of the above conventional assumptions, or impressions, consistent with the reality of international arbitration scholarship? Is there really a significant disconnect as to how international arbitration scholars conduct research across cultural lines? These are considered in the next section.

III. ARBITRATION RESEARCH BY THE NUMBERS: WHAT COMPARING TEN YEARS OF FRENCH AND ENGLISH DOCTORAL THESES TELLS US?

A. Methodology

Bringing some objectivity to the question of whether legal culture affects the manner in which we conduct research in international arbitration is not an easy task. For this paper, we have taken an approach (very) loosely inspired by Robert C. Ellickson’s article “Trends in Legal Scholarship: A Statistical Study”\(^ {22}\). In his article Ellickson looked at the evolution, during the period


\(^{19}\) Ibid.

\(^{20}\) Van Gestel and Micklitz go as far as describing Germany as ”a bastion of legal dogmatics” (noting however that pressure on German academics is mounting to move away from purely doctrinal scholarship). R. Van Gestel and H. -W. Micklitz, *Why Methods Matter in European Legal Scholarship*, 20 European Law Journal 3, 296 (2014).

\(^{21}\) J. R. Van Gestel and H. -W. Micklitz, *Why Methods Matter in European Legal Scholarship*, 20 European Law Journal 3, 294 (2014); citing J. Rachlinski, *Evidenced based law*, 96 Cornell Law Review 907-908 (2011). These authors also mention as a factor for the enduring popularity of doctrinal research in Europe the fact that the differences between the laws of the various legal systems of the European Union continue to offer a fertile ground for legal doctrinal research. Another explanation offered by these authors is the “deeper roots” that the doctrinal method would have in Europe “dating back to the Renaissance of Roman Law”.

1982-96, of the appeal of various approaches to legal scholarship in America (e.g. law and economics, critical legal studies, socio-legal studies etc.). For these purposes, he identified “keywords” which could reliably serve as proxies for these different theoretical approaches, and then performed searches using these keywords in a legal database containing law review articles in full text\(^{23}\). Ellickson’s quantitative method allowed him to bring some objectivity to the debate as to whether various approaches to legal scholarship had become more or less popular over a period of time.

Applying a similar methodology to determine whether scholars approach legal research in arbitration differently across cultural lines is difficult for a number of reasons. As a starting point, databases such as Westlaw (which was the database used by Ellickson) do not easily permit to single out search results based on the cultural origin of authors. For example, there is no search function on Westlaw that would allow the segregation of materials (whether law journals or books) based on the authors’ jurisdiction – assuming that one may use the jurisdiction of origin of an author as a proxy for his legal culture. Furthermore, performing identical keyword searches in different databases for each different jurisdiction (namely, Westlaw US, Westlaw UK etc.) would not provide significant results, because it would be difficult to neutralize differences relating to the composition of the respective databases.

In light of the above, the approach, which I have taken, is to consider doctoral research in the field of international arbitration. A study of PhD theses should provide some insight as to differences in approaches to legal scholarship in arbitration, because despite differences in the structure of and requirements applicable to doctoral programmes across countries, doctoral theses share some highly relevant features: (1) they are a relatively lengthy pieces of research in which choice of methodology is therefore likely to be considered more carefully than in shorter academic productions, including journal articles; (2) they are produced under the supervision of a professional academic whose primary responsibility is to ensure that the thesis abides by basic standards of academic research; and (3) they are ultimately destined to be assessed by a panel of other professional academics to determine whether the author has displayed the research skills that will be expected of him as a future academic. As such, doctoral theses, more than other types of academic productions, can be expected to reflect approaches to legal scholarship that are peculiar to the particular cultural environment in which they are made.

---

\(^{23}\) The database used by Ellickson was Westlaw (US). Ellickson’s article found, inter alia, “[…] little or no decline in doctrinal analysis, a modest rise in law and economics, and a boom and subsequent bust in Critical Legal Studies. Leading law reviews have been unusually prone to publish works that refer to civic republicanism, Critical Legal Studies, Critical Race Theory, and social norms.”
For this paper, I chose to look at doctoral theses completed in France and the UK during the period 2005-2015. The data used for this paper was extracted from the official repositories of doctoral theses in these two countries. In England, the repository used was ETHOS\(^{24}\). For France, I used the two official repositories of theses, SUDOC\(^{25}\), and "Theses.fr"\(^{26}\). ETHOS and SUDOC contain abstracts of thesis, which typically reveal some information about the subject, scope, methodology and key findings of the theses\(^{27}\). For the present paper, I was interested in doctoral theses focusing specifically on international arbitration law or practice. I was not interested in theses in neighbouring fields of law, which took a mere incidental interest in arbitration. In order to identify doctoral theses in the field of international arbitration, I performed title searches using the search terms "arbitration" or "arbitral" in English, and "arbitrage" or "arbitral" in French. I then manually neutralized any false positives, in the sense of theses produced in academic fields other than law but using one of the above terms in the title, as well as theses in the field of law but not related to arbitration\(^{28}\). Our search was also limited to doctoral theses, which were successfully defended. This was to ensure that the doctoral theses studied for this paper had been ‘validated’ by scholars as meeting some basic standard of academic quality. Overall, our searches returned 103 doctoral theses for France and 62 for the UK for the period 2005-2015.

I then proceeded to analyse the titles and abstracts of the theses to identify what they revealed, in particular as to their author’s choices of research methodologies and choices of topics. For the purposes of identifying choices of methodologies, I used some of Ellickson’s own proxies. For example, for law and economics, I looked (mostly in vain\(^{29}\)) for such terms as “risk-avers!” , “game theor!”, “human capital”. For socio-legal studies, I looked at “Empiric!”, “Quantitat!”, and “Statistic!” And for law and psychology I looked for “Cognitiv!”. The abstracts on the French repositories were available in English, so that the same search terms could be used for UK and French theses.

\(^{24}\) The ETHOS repository is available at [http://ethos.bl.uk](http://ethos.bl.uk). ETHOS, which is maintained by the British Library, describes itself as the UK’s “national thesis service”. It aims to provide a “national aggregated record of all doctoral theses awarded by UK Higher Education institutions”. It is not however exhaustive.

\(^{25}\) The SUDOC repository is available at [http://www.sudoc.abes.fr](http://www.sudoc.abes.fr). SUDOC, which stands for French University Documentation System, is a catalogue jointly compiled by French Universities which aims at recording, *inter alia*, all doctoral theses produced in France.

\(^{26}\) The Theses.fr repository is available at [http://wwwtheses.fr](http://wwwtheses.fr). This repository was established by the Ministry of Education with a view to improve the visibility of French research. Its mission is overlapping with that of the SUDOC.

\(^{27}\) Some but not all of the entries on theses.fr contain an abstract.

\(^{28}\) For example, constitutional law theses on the “arbitrage” functions of the Head of State in this or that country.

\(^{29}\) See discussions below on the overall failure of UK and French doctoral candidates to engage with multidisciplinary approaches.
For the choices of topics, I established a list of potential topics, and then proceeded to count the number of occurrences of these pre-established topics\(^\text{30}\). In this respect, it should be noted that some doctoral theses refer to more than one subject. For example, a French thesis entitled “Arbitration agreements and the formation of the Arbitral Tribunal under the laws of the GCC Countries”\(^\text{31}\) was categorised as concerning both the topics of “arbitration agreements” and “formation of tribunals”\(^\text{32}\). Ultimately, the list of topics was expanded to reflect the fact that I found in the theses studied, a number of topics, which were not in my original list.

36.18 Naturally, the method described above is not perfect, and as all quantitative endeavours it carries a number of limitations. In our case, one such limitation is that it is limited to two particular cultural environments: academia in France and the UK. It would be interesting to extend this research to other jurisdictions where a significant amount of scholarship on international arbitration is produced, such as Australia, Germany or Switzerland. It would be difficult to extend this approach to North America, because of the lack of centralised repository for SJDs/JSDs theses\(^\text{33}\), and the presumably limited number of such theses. A second limitation is that using the place where a doctoral degree is completed as a proxy for legal culture does not take into consideration the fact that modern legal education is increasingly globalised, so that many doctoral researchers in both the UK and France may not, in fact, be culturally English or French. These authors may bring into their research aspects of their own legal cultures. Overall, however, the research offers some interesting insights into the question of the impact of legal culture on academic research in arbitration. But what insights exactly?

**B. Findings: General approaches to research methodology**

36.19 As previously explained, my pre-research assumption was that sharp differences existed, across cultural lines, as to the manner in which researchers approached the question of methodology. In particular, common law researchers were expected to be more amenable to extending the scope of their intellectual enquiry beyond the law, into other non-legal disciplines.

\(^{30}\) Manually, as opposed to by using search terms.

\(^{31}\) Translation by this author. In the original language: “Convention d’arbitrage et constitution du tribunal arbitral dans les législations des pays membres du conseil de coopération du golfe”, by Sabah Abdulsalam, University of Dijon.

\(^{32}\) It was also categorised as being a comparative law thesis, as well as a thesis looking at one or more particular geographic area. See below.

\(^{33}\) In addition, because most US and Canadian academics do not have to pursue a doctoral degree in law in order to secure permanent employment the number of SJD or JSD theses in arbitration would most likely be very limited.
Specifically, I was expecting a stronger popularity in the UK of such approaches as “law and economics”, “law and psychology”, and “socio-legal studies” (as opposed to purely legal doctrinal approaches). Consequently, there was also an expectation of a more frequent use of empirical (and in particular quantitative) methods in UK doctoral theses than in French ones.

**B1. Multi-disciplinary research (and empirical methods)**

36.20 Surprisingly, a striking finding of the research was the similarity of UK and French doctoral theses when considering overall approaches to research methodology. Both UK and French theses favoured traditional legal-doctrinal approaches over multi-disciplinary ones. It is interesting to note, for example, that none of the UK and French theses professed in their title the use of an empirical method\(^{34}\). Another stand out feature for both UK and French theses is that very few theses concern topics which lend themselves naturally to non-doctrinal research. To take one typical example, a thesis entitled “*Notion, nature and extent of consent in international arbitration*”\(^{35}\) lends itself more naturally to a legal doctrinal analysis than a multidisciplinary one. The same is true for another theses titled: “*The new Jordanian Arbitration Act 2001 and the contribution of the model law to its development*”\(^{36}\).

36.21 The study of the theses’ abstracts show that a handful of theses did adopt an empirical approach, as the table below indicates. However, what is striking is that, when an empirical approach was taken, it was done incidentally. In other words, it was in addition to an otherwise primarily legal-doctrinal analysis. For instance, this was the case of a French doctoral thesis which title translates as “*Compliance by the arbitrator with its mandate*”\(^{37}\). The author of this thesis first employed a legal doctrinal method to analyse *inter alia* the approaches taken by French judges to applications to set aside or resist enforcement of awards based on the alleged failure by an arbitrator to fulfil its mandate. The author then used a statistical study to corroborate the findings of his legal doctrinal analysis.

---

\(^{34}\) In other words, not a single thesis indicated in the title the use of an empirical method.


Table 1 - Doctoral Theses in Arbitration with an overtly\textsuperscript{38} Empirical Approach in the UK and France (2005-2015)

<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Empirical</td>
<td>1%</td>
<td>3.3%</td>
</tr>
</tbody>
</table>

36.22 As the table above illustrates, if empirical theses were uncommon in both France and the UK, the number of theses with an overt empirical approach remains significantly higher in the UK than in France. Between 2005 and 2015, there were over three times as many arbitration PhDs with an overt empirical approach in the UK as in France.

36.23 Not all empirical research is multidisciplinary, and \textit{vice versa}. But this survey of doctoral theses suggests that, similar to the use of empirical methods, multi-disciplinary approaches were also rare in both the UK and French theses. In addition, multi-disciplinary research appears to be rarer in France than in the UK. Overall, 4.8% of the French theses in our sample were concerned with a discipline other than law. This compares to 8.1% in the UK. In terms of which other discipline (in addition to law) was the object of the thesis, political sciences & international relations (including development studies) proved most popular on both sides of the Channel. Surprisingly law and economics and socio-legal studies did not feature prominently (with only one thesis in each field in the UK, and none in any of these fields in France).

Table 2 - Doctoral Theses in Arbitration with an Overtly Multi-disciplinary Approach in the UK and France (2005-2015)

<table>
<thead>
<tr>
<th>Second discipline</th>
<th>France</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Political Science &amp; International Relations (including Development Studies)</td>
<td>2.9%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Business Studies</td>
<td>1.9%</td>
<td>0%</td>
</tr>
<tr>
<td>Sociology</td>
<td>0%</td>
<td>1.6%</td>
</tr>
</tbody>
</table>

\textsuperscript{38} In the sense that the methodological stance is apparent from a review of the thesis’ title or abstract. A thesis may take a particular methodological stance despite it not appearing clearly from the title or abstract of the thesis.
B.2. Historical research

36.24 Interestingly, French doctoral candidates displayed more interest in historical enquiries than their British counterparts. The number of doctoral thesis with an overt historical stance was as much as four times higher in France than in the UK, with notable examples including a thesis which titles translates as: “Arbitration in Angers (1667-1806): General notion and practice”\(^ {39} \). Another example included a historical and comparative analysis of the reasons (or explanations) for the success of arbitration\(^ {40} \).

**Table 3 - Doctoral Theses in Arbitration with an overtly historical stance in the UK and France (2005-2015)**

<table>
<thead>
<tr>
<th>Field</th>
<th>France</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Economic</td>
<td>3.8%</td>
<td>1.6%</td>
</tr>
</tbody>
</table>

36.25 This may reflect the fact that history of the law occupies a more important place in French law schools than in other jurisdictions. One of the reasons for this is that the topic is taught as a mandatory undergraduate module in France\(^ {41} \). Also, legal history stands, alongside private law and public law, as one of the (only) three areas of specialisations from which an aspiring French academic has to choose for the purposes of the infamous exam called “agrégation de droit”\(^ {42} \).

B.3. Comparative research

36.26 French and UK doctoral candidates displayed a similar level of interest for comparative research with 30% and 36% of theses professing a comparative approach in France and the UK respectively. Naturally, the jurisdictions to

---


\(^{41}\) Law schools normally require undergraduate awe students to take two one-semester module in the field: history of the law, and history of legal institutions.

\(^{42}\) The aggregation is the French national ranking exam which young academics are acquired to take in order to obtain the title of Law Professor.
which French and English laws were compared differed. The differences reflected more or less accurately the cultural ties that France and England respectively entertain with the various regions or countries. For example, French students often chose to focus their interest on North African jurisdictions, whereas UK researchers were drawn to Anglophone Africa and those Middle Eastern jurisdictions that were once under British protectorate.

Table 4 – Comparative Law Research in French Arbitration Theses (2005-2015): Choice of Jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Relative Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arab countries(^{43})</td>
<td>44.8%</td>
</tr>
<tr>
<td>Africa (excluding Arab countries)(^{44})</td>
<td>13.8%</td>
</tr>
<tr>
<td>Common-law jurisdictions(^{45})</td>
<td>13.8%</td>
</tr>
<tr>
<td>Latin America(^{46})</td>
<td>7%</td>
</tr>
<tr>
<td>Germany</td>
<td>3.4%</td>
</tr>
<tr>
<td>Switzerland</td>
<td>3.4%</td>
</tr>
<tr>
<td>Other jurisdictions(^{47})</td>
<td>13.8%</td>
</tr>
</tbody>
</table>

Table 4 – Comparative Law Research in UK Arbitration Theses (2005-2015): Choice of Jurisdictions

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Relative Frequency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Middle East(^{48})</td>
<td>50%</td>
</tr>
<tr>
<td>Nigeria</td>
<td>13.7%</td>
</tr>
</tbody>
</table>

\(^{43}\) Including theses on “the Maghreb”, “Arab Countries”, the “Gulf”, Tunisia, Algeria, Morocco, Lebanon and Egypt.

\(^{44}\) Including Sub-Saharan Africa and the OHADA area.

\(^{45}\) Including the United States and England & Wales.

\(^{46}\) Including Latin America and MERCOSUR countries.

\(^{47}\) Including Greece, Romania, the UAE and Turkey.

\(^{48}\) Including the “GCC”, Saudi Arabia, Egypt, Bahrain.
Scotland 9%
United States 9%
Other countries 18.3%

C. Findings: Choice of topics

36.27 An area where differences between UK and French doctoral theses are particularly noticeable is the choice of topics covered by the theses. Differences may be observed as to the prevalence of commercial vs. investment arbitration; the breadth or scope of the topics chosen; the theoreticality/practicality of the themes studied.

C1. Commercial vs Investment Arbitration

36.28 Our survey of doctoral theses reveals a much stronger interest for investment arbitration in the UK than in France. Between 2005 and 2015, just under 30% of UK doctoral theses were specifically dedicated to investment arbitration. This compares to only 9.2% in France. This is perhaps surprising, because public international law features more prominently in the curricula of French law faculties than in English LLB programmes. Public International law is a mandatory module in French undergraduate legal education for those students who choose to specialise in public law (that is to say approximately half of law students). Such sub-areas as state responsibility or the law of treaties seem to be more widely taught in continental European law schools than in the UK.

Table 3 - Investment Arbitration vs Commercial Arbitration

<table>
<thead>
<tr>
<th></th>
<th>France</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial</td>
<td>16.5%</td>
<td>16.4%</td>
</tr>
</tbody>
</table>

49 Including Brazil, France, Korea and China.
50 Another difference is that UK theses less frequently fail to specify in their title whether the thesis concerns investment or commercial arbitration or both.
51 Addressing this question from the German perspective, see the blog entry: Hannah Birkenkötter and M. Möldner, The future of teaching international law, http://voelkerrechtsblog.com/2014/05/19/the-future-of-teaching-international-law/comment-page-1 (accessed 12 October 2015).
C2. Breadth of topics

36.29 As to the breadth or scope of topics, UK theses often appear more specific than their French counterparts. Theses discussing arbitration in general in a particular country or region are a more common occurrence in France. For example, a French thesis addressed “International commercial arbitration in Vietnam”\(^52\). Another example was a thesis discussing “Arbitration in Algeria’s foreign trade relations”\(^53\). Another even more ambitious thesis discussed the law and practice of international commercial arbitration in sub-Saharan Africa\(^54\). In comparison, UK theses were, on balance, more focused. For example, one UK thesis considered “Consumer confidence in online cross-border business-to-consumer arbitration”\(^55\). This is in direct contrast with a more general French thesis in the same area with the title, “Online arbitration of disputes relating to the internet”\(^56\). Of course, this difference between UK and French theses is in part explained by the fact that PhD theses tend to be shorter in the UK, with a word limit at or below 100,000 words being relatively common across British law schools. No such word limits are typically imposed in France, where 400+ pages theses are common. But differences in breadth of topics may also reflect a greater tolerance for long descriptive sections or chapters in continental European theses. This in turn may be a factor of the premium that is arguably placed in some continental European doctoral programmes on ‘exhaustiveness’ over conciseness\(^57\).

\(^{52}\) Translation by this author. Chinh Cham Liem, *L’arbitrage commercial international au Vietnam*, University Paris 2 (1999).


\(^{57}\) See Raphael Romi, *Méthodologie de la Recherche en Droit*, 16, (2nd Ed., Litec 2011), suggesting that while exhaustiveness is not an objective of the doctoral thesis, the scope of the review to be performed necessarily needs to be extensive.
C3. Themes covered

36.30 Table 6 below breaks down the topics chosen by doctoral candidates in France and the UK for the period 2005-2015. It should be noted that some doctoral theses cover more than one topic. When this is the case, all topics, as they appear from the title and / or abstract of a thesis, have been counted. The figures in the table below, therefore, indicate the overall percentage of doctoral theses in which the corresponding topic appeared.

Table 6 - Breakdown of Topics in French and UK Arbitration theses (2005-2015)

<table>
<thead>
<tr>
<th>Theme</th>
<th>France</th>
<th>UK</th>
</tr>
</thead>
<tbody>
<tr>
<td>Party autonomy</td>
<td>2.9%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Arbitrability</td>
<td>1%</td>
<td>3.27%</td>
</tr>
<tr>
<td>Arbitration agreement / Consent / Jurisdiction</td>
<td>15.5%</td>
<td>14.75%</td>
</tr>
<tr>
<td>Formation of the Arbitral Tribunal</td>
<td>1%</td>
<td>0%</td>
</tr>
<tr>
<td>Procedure / Arbitral process / Practice</td>
<td>6.8%</td>
<td>13.1%</td>
</tr>
<tr>
<td>Provisional measures</td>
<td>1%</td>
<td>3.27%</td>
</tr>
<tr>
<td>Online arbitration / E-commerce</td>
<td>2%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Power of arbitrators / Remedies</td>
<td>2.9%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Awards and their enforcement (including set aside proceedings)</td>
<td>6.8%</td>
<td>9.8%</td>
</tr>
<tr>
<td>Relationship between parties and arbitrators / Liability of arbitrators / Arbitrator's contract</td>
<td>3.8%</td>
<td>0%</td>
</tr>
<tr>
<td>Multi-party arbitration / Third parties / Parties</td>
<td>6.8%</td>
<td>0%</td>
</tr>
<tr>
<td>Applicable law / legal framework (including conflicts of laws, conflicts of jurisdictions and lis pendens)</td>
<td>13.6%</td>
<td>21.3%</td>
</tr>
<tr>
<td>Merits / Substantive norms (including lex mercatoria, UNIDROIT principles, and BIT norms)</td>
<td>6.8%</td>
<td>9.8%</td>
</tr>
<tr>
<td>----------------------------------------------------------------------</td>
<td>--------------</td>
<td>------------------</td>
</tr>
<tr>
<td>UNCITRAL Model law</td>
<td>1%</td>
<td>6.55%</td>
</tr>
<tr>
<td>Domestic courts (including relationship with arbitral tribunals, and role of the courts)</td>
<td>2.9%</td>
<td>8.2%</td>
</tr>
<tr>
<td>Arbitral Institutions / Institutional arbitration / Arbitration under the rules of a particular centre</td>
<td>4.8%</td>
<td>1.6%</td>
</tr>
<tr>
<td>Decision-making in arbitration</td>
<td>0%</td>
<td>0%</td>
</tr>
<tr>
<td>Legal theory / Legal philosophy / Theory of arbitration</td>
<td>3.8%</td>
<td>0%</td>
</tr>
<tr>
<td>Arbitration as a mechanism / Governance &amp; Arbitration</td>
<td>7.8%</td>
<td>13.1%</td>
</tr>
<tr>
<td>State contracts</td>
<td>5.8%</td>
<td>4.9%</td>
</tr>
<tr>
<td>Arbitration &amp; [OTHER LEGAL FIELD]</td>
<td>4.8%</td>
<td>6.55%</td>
</tr>
<tr>
<td>Arbitration in [A PARTICULAR REGION/COUNTRY]</td>
<td>9.7%</td>
<td>6.55%</td>
</tr>
<tr>
<td>Arbitration in [A PARTICULAR INDUSTRY]</td>
<td>6.8%</td>
<td>3.27%</td>
</tr>
</tbody>
</table>

What is striking when looking at the above table is, the fact that some of the more practical topics, seem to have been more popular with UK researchers than French researchers. For example, this is the case for topics falling in the category ‘Procedure / Arbitral process / Practice’. Such topics have been chosen in 13.1% of UK theses during the period 2005-2015, as against only 6.8% of French theses. In a similar vein, ‘Awards and their enforcement (including set aside proceedings)’ appeared in 9.8% of UK thesis when compared to only 6.8% in France. Likewise, the role of domestic courts vis-a-vis international arbitration, another highly practical subject, was more frequently chosen in the UK than in France (8.2% vs 2.9%). Other examples of practice oriented topics, which were favoured by UK researchers, include provisional measures (3.27% of theses in the UK, for 1% in France), and online arbitration / E-commerce (4.9% of theses in the UK, for 2% in France). In light of the assumption that, in civil law jurisdictions, research that aims at clarifying the position of the law for the benefit of practitioners (i.e. black letter law research) is less frowned upon by academics than in a common law

---

58 Excluding comparative theses on a specific aspects of arbitration.
59 Industries chosen in France comprised sport, construction, maritime and energy.
60 Industries chosen in the UK comprised banking and energy.
jurisdictions, the higher frequency of practice oriented topics in the UK is perhaps a little surprising.

36.32 At the same time, this research does not suggest a lack of interest in theoretical questions on the part of French researchers – and this is what is fascinating with this survey. Legal theory or legal philosophy topics (including, for example, on the normativity of the arbitration order; on law making in arbitration etc.) have been favoured by French students. During the period 2005-2015, 3.8% of French theses were overtly on a subject of theory of arbitration, when no UK thesis was dedicated to this topic.

36.33 In a similar vein, French doctorants have shown at least as much, if not more, interest, than their UK counterparts in ‘systemic topics’. By systemic topics, I mean those topics which relate to the manner in which the arbitral system as a whole operates, without necessarily crossing into legal theory or legal philosophy. For instance, theses on ‘Party autonomy’ in general (2.9% in France vs 1.6% UK), or on the nature of the relationship between the arbitrators and parties61 (3.8% vs 0%) were more frequent in France than in the UK. On the other hand, theses exploring arbitration in general as a dispute resolution mechanism or arbitration as a ‘governance’ tool were more frequent in the UK (7.8% France vs 13.1% UK)62.

36.34 Interestingly a similarity between the UK and France is that not a single thesis during the period 2005-2015 focused on ‘Decision-making in arbitration’, in the sense of the manner in which decision are made within tribunals. This question, which seems very topical in North America63, lends itself particularly well to multidisciplinary research. This arguably suggests a divide between North America and Europe on Multidisciplinary research, like law and psychology (but, also law and economics, sociology of law etc.).

36.35 Another peculiar finding illustrated by the table above is that, while the UNCITRAL Model law received some interest in the UK (with 6.5% of UK thesis on the subject), not a single French thesis overtly considered it. A possible reason for this may be that French arbitration law developed

61 Including liability of arbitrators and the question of the arbitrator’s contract.

62 ‘Arbitration as a mechanism / Governance & Arbitration’.

independently from (and prior to) the Model Law, so that the Model Law may not be well known and widely taught in French law schools\(^{64}\) when compared to other jurisdictions.

36.36 However, the most interesting finding is that certain topics have received similar levels of attention in the UK and France in circumstances where differences between the civil law and common law might have suggested otherwise. For example, ‘State contracts’ and more generally the challenges raised by the involvement of States in arbitration proceedings have attracted the same level of interest across the two jurisdictions\(^{65}\). This is somewhat counterintuitive considering the sharper divide between administrative law and private law in France than in the UK\(^{66}\).

36.37 Similarly, English and French doctoral students have looked at the interaction between arbitration law and other branches of the law in similar proportions (5.75% vs 6.5%). On the other hand, the branches of law chosen by French and UK researchers were not the same, with French researchers showing more interest in EU and competition law\(^{67}\) than their UK counterparts\(^{68}\). Again, this may reflect the greater emphasis on EU law teaching in European law schools when compared to the UK.

36.38 Some thesis explored arbitration in general in one particular geographical area. As previously indicated, a French thesis addressed, for instance, “International commercial arbitration in Vietnam”. Naturally French and UK researchers were interested in different geographical areas, and any differences observed may be explained by the cultural ties, that France and England respectively have entertained with the relevant regions. For example, French students chose to study arbitration in such countries or areas as the ‘Maghreb’ or ‘Sub-Saharan Africa’\(^{69}\), Vietnam, or Canada. The same is true of the English theses, with popular countries including Nigeria, Oman, Jordan or Kuwait.

36.39 In a similar vein, when theses took a comparative law approach (as opposed to considering the use of practice of arbitration “in” a particular region or country), the jurisdictions examined reflected the historical links of France and Great Britain respectively. In France, doctoral researchers frequently looked at what can be described as, Arabic countries and, collectively, the ‘Maghreb’, ‘Arab countries’, and the ‘Gulf’, accounted for 5 theses. In addition to these 5 theses, there were thesis studying individually


\(^{65}\) With 5.8% and 4.9% of theses in France and the UK respectively.


\(^{67}\) Other fields included tax law, human rights and corporate law.

\(^{68}\) For UK theses the fields of law included contracts law, constitutional law, tax law and environmental law.

\(^{69}\) The OHADA area was also a popular choice.
other Arabic jurisdictions such as, Tunisia, Morocco, Algeria, Lebanon, and Egypt. Sub-Saharan Africa (including OAHADA jurisdictions) were also popular\textsuperscript{70}. Other popular jurisdictions for French comparative law theses included the United States and England\textsuperscript{71}. In England, Saudi Arabia and Nigeria were most popular\textsuperscript{72}, but the ‘GCC’ countries, the ‘Middle East’ and ‘Arab countries’, taken together, attracted a lot of attention too\textsuperscript{73}.

IV. CONCLUSIONS

36.40 There is no easy way to assess the extent to which legal culture affects the manner in which we conduct academic research in international arbitration. Our research was based on a review of ten years of doctoral research in France and the UK. It illustrates that, while remarkably similar in their failure to embrace multidisciplinary approaches to research, as well as non-legal doctrinal methodologies, doctoral theses in the UK and France do display some differences, in particular with respect to choice of topics. The prevalence of commercial vs. investment arbitration; the breadth or scope of the topics chosen; the theoreticality/practicality of the themes studied were some of the most visible differences observed.

\textsuperscript{70} With 4 theses.

\textsuperscript{71} Each with two theses. The other jurisdictions examined by French students included Germany, Greece, Switzerland, Romania, the UAE, Turkey, and ‘Latin America’.

\textsuperscript{72} With 3 theses each.

\textsuperscript{73} With 5 theses in total. Other countries included, Scotland, Egypt, the United States, Brazil, Bahrain, France, Korea, and China.